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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

John Melnik,

Plaintiff,

v.

Romeo Aranas,

Defendant.

Case No. 2:17-cv-02378-JCM-GWF

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Defendant, Romeo Aranas (Dr. Aranas), by and through counsel, Aaron D. Ford, Nevada Attorney General, and Henry Kim, Deputy Attorney General, and hereby moves for summary disposition of this matter in their favor. This motion is made and based on Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), the following memorandum of points and authorities, all pleadings and papers on file, the attached exhibits, and any other evidence the Court deems appropriate to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff John Melnik is an inmate lawfully incarcerated in the Nevada Department of Corrections ("NDOC") and currently housed at High Desert State Prison (HDSP). On September 5, 2017, Melnik filed a Civil Rights Complaint (Complaint) pursuant to 42 U.S.C. Section 1983. (See ECF No. 1-1).

...

1 In its Screening Order dated July 2, 2018, this Court ordered that Melnik's Eighth
2 Amendment claim for deliberate medical indifference to proceed against Dr. Aranas. (ECF
3 No. 3 at 7:4-5).

4 **II. STATEMENT OF UNDISPUTED FACTS**

5 **A. Factual Background**

6 Melnik alleges that he was diagnosed with Hepatitis C virus (HCV) infection in 2006.
7 ECF No. 4 at 5. In October of 2014, Food and Drug Administration (FDA) approved the use
8 of Harvoni, the first ever Direct Acting Antiviral (DAA) released in the United States for
9 treatment of HCV that does not require concomitant treatment with interferon. *See* Dr.
10 David Hellerstein's Expert Witness Report, attached as **Exhibit 1**, at 3. On November 4,
11 2014, Melnik submitted a medical request regarding HCV treatment for the first time. *See*
12 Melnik's Medical Records through December 12, 2018, attached as **Exhibit 2**, at 1.¹ On
13 November 12, 2014, Melnik was seen and lab studies were ordered. Ex. 2 at 2. Lab studies
14 revealed an Aspartate Aminotransferase Platelet Ratio Index (APRI) score of 1.24. Ex. 1 at
15 4.

16 On March 19, 2015, during a nursing visit for knee pain, Melnik asked about his
17 eligibility for HCV treatment. Ex. 2 at 3. In April, Melnik was transferred to Ely State
18 Prison. Ex. 1 at 4. On April 29, 2015, Dr. Koehn ordered a hepatitis panel. *Id.* On June 24,
19 2015, Dr. Koehn met with Melnik to discuss the results of the hepatitis panel. Ex. 2 at 4.

20 On June 8, 2015, Dr. Koehn ordered HCV genotype test, which confirmed HCV
21 infection. *Id.* at 5; *see also* Ex. 1 at 4. Melnik was enrolled in the Chronic Disease Clinic for
22 HCV infection. Ex. 2 at 5; *see also* Ex. 1 at 4. On June 24, 2015, Dr. Koehn met with Melnik
23 to discuss HCV labs and answer Melnik's questions. Ex. 2 at 200. Melnik's APRI score on
24 June 24, 2015, was 1.336. *Id.*

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26 . . .

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28 ¹ Exhibit 2 is a collection of medical records used in this Motion. If necessary, the entire
medical file of Melnik will be provided to this Court upon order.

1 On July 9, 2015, Dr. Koehn saw Melnik to discuss HCV labs. *Id.* at 5. On July 26,
2 2015, Melnik submitted a medical request for Harvoni treatment for his HCV infection. *Id.*
3 at 334. He was submitted for potential treatment. *Id.*

4 In September of 2015, Melnik's APRI score improved slightly to 1.44, based on lab
5 studies taken in September and an estimate of his platelet count. Ex. 1 at 4. However, in
6 November of 2015, Melnik's APRI score rose to 1.97. *Id.* Ex. 2 at 6. On November 24, 2015,
7 Dr. Koehn ordered Melnik to be referred to the Hepatitis C committee (the Committee) to
8 be approved for treatment. *Id.*

9 On March 30, 2016, Melnik's APRI score was 2.068. *Id.* at 196. Dr. Koehn referred
10 Melnik to the Committee. *Id.* at 8.

11 On August 3, 2016, Melnik submitted a medical request stating that his APRI score
12 was 2.074 and that he is eligible for HCV treatment. *Id.* at 9. Gloria Carpenter, Director of
13 Nursing Services, responded to his request that Melnik is still on the list to be seen and
14 that another provider is coming in the following week. *Id.* However, in September of 2016,
15 Melnik's APRI score fell to 1.68. Ex. 1 at 5.

16 On October 13, 2016, HCV advanced practice nurse saw Melnik in HCV clinic
17 nothing his request for treatment. Ex. 2 at 10. He documents Melnik's HCV control as
18 "fair," and again refers him to the Committee. *Id.*

19 On November 28, 2016, Melnik submitted a medical request stating that his liver
20 feels like it was swollen. *Id.* at 11. A provider ordered liver function tests and an ultrasound.
21 *Id.* Dr. Hellerstein opined that Melnik's APRI score likely remained less than 2, based on
22 the liver function test results in November and his platelet count taken several months
23 later. Ex. 1 at 6.

24 On December 15, 2016, ultrasound of the abdomen was performed on Melnik. Ex. 2
25 at 12. Dr. Robert Leckie, who performed the examination, found an enlarged liver and
26 spleen, the latter "possibly from mild elevation of the portal venous pressure secondary to
27 cirrhosis." *Id.*

28 . . .

1 On January 2, 2017, Melnik submitted a medical request asking if he has been
2 approved for HCV treatment. *Id.* at 13. A Registered Nurse responded that the 2017
3 Committee has not been formed and that she will inform Melnik when she receives more
4 information. *Id.*

5 On February 9, 2017, Melnik submitted a medical request asking if he has been
6 approved for Harvoni treatment. *Id.* at 14. A Registered Nurse responded that the
7 Committee was emailed to check on the status of his request for treatment and that Melnik
8 is enrolled in Chronic Disease Clinic to check on his APRI score . *Id.*

9 On March 9, 2017, Melnik's APRI score was 2.09. *Id.* at 6. Melnik is informed that
10 his blood work will be sent to the new Committee for review. *Id.* On April 11, 2017, Melnik
11 was seen at Chronic Disease Clinic and HCV lab studies were completed. *Id.* at 15. On the
12 same day, HCV patient data form was submitted to the Committee for review. *Id.*

13 On May 9, 2017, Melnik was approved for HCV treatment. *Id.* On June 21, 2017,
14 Melnik was seen for the initial HCV treatment. *Id.* Melnik received Harvoni once daily for
15 twelve weeks. *Id.* at 16; Ex. 1 at 7. As of August of 2017, Melnik's liver functions are normal
16 and his APRI was down to 0.49. Ex. 1 at 7. On September 28, 2017, HCV treatment on
17 Melnik was completed. Ex. 2 at 17. As of November of 2017, HCV remained undetectable,
18 Melnik's liver function tests remained normal, and his APRI score was 0.38. Ex. 1 at 7. In
19 March of 2018, HCV was still undetectable, Melnik's liver function tests were normal, and
20 his APRI score was 0.38. *Id.*

21 **B. NDOC's HCV Treatment Policy (Medical Directive 219)**

22 Consistent with the standard of practice at the time, NDOC policy on HCV treatment
23 has prioritized treatment for HCV for patients whose lab tests suggested a high likelihood
24 of developing serious liver damage, such as advanced fibrosis or cirrhosis. Ex. 1 at 8.

25 NDOC mainly used the APRI score, a measure based on blood tests, to monitor HCV
26 patients. *Id.* An APRI score does not diagnose cirrhosis or advanced fibrosis. *Id.* Rather, an
27 APRI score is used to identify when disease progression to permanent liver damage is
28 likely. *Id.* at 9. NDOC required that a patient's APRI score to exceed 2.00 to be approved

1 for treatment, a lower threshold of 1.5 if other evidence of advanced fibrosis or cirrhosis is
 2 present. *Id.*; see also NDOC Medical Directive 2015 effective as of September 2015, attached
 3 as **Exhibit 3**, at 1. The Federal Bureau of Prisons and several other state correctional
 4 systems at that time were using similar measures to prioritize treatment. Ex. 1 at 9. In
 5 fact, the Federal Bureau of Prisons still use APRI score of 2.00 to monitor progression of
 6 HCV infection. See Federal Bureau of Prisons Clinical Practice Guidelines effective as of
 7 January 2018, attached as **Exhibit 4**, at 10.

8 **III. LEGAL STANDARD**

9 **A. Summary Judgment Under FED. R. CIV. P. 56**

10 Pursuant to FRCP 56(a), summary judgment is proper “if the movant shows that
 11 there is no genuine dispute as to any material fact and the movant is entitled to judgment
 12 as a matter of law.” A dispute as to a material fact is “genuine” if the evidence is such that
 13 a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty*
 14 *Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15 The moving party for summary judgment has the initial burden of showing the
 16 absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157
 17 (1970). To carry this burden, the moving party need not introduce any affirmative evidence
 18 (such as affidavits or deposition excerpts) but may simply point out the absence of evidence
 19 to support the nonmoving party’s case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d
 20 528, 532 (9th Cir. 2000). Once the movant’s burden is met by presenting evidence which, if
 21 uncontroverted, would entitle the movant to a directed verdict at trial, the burden then
 22 shifts to the respondent to set forth specific facts demonstrating that there is a genuine
 23 issue for trial. *Anderson*, 477 U.S. at 250. If the factual context makes the respondent’s
 24 claim implausible, that party must come forward with more persuasive evidence than
 25 would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp.*
 26 *v. Catrett*, 477 U.S. 317, 323-324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
 27 475 U.S. 574, 586-87 (1986).

28 . . .

1 If the party seeking summary judgment meets its burden, then summary judgment
2 will be granted unless there is significant probative evidence tending to support the
3 opponent's legal theory. *First National Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290
4 (1968); *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 282 (9th Cir.
5 1979). Conclusory or speculative testimony is insufficient to raise a genuine issue of fact
6 and defeat summary judgment. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d
7 730, 738 (9th Cir. 1979) (ruling that a conclusory and speculative affidavit did not defeat
8 summary judgment because it "failed to set forth any specific facts within [the declarant's]
9 personal knowledge"). An affidavit or declaration will not defeat summary judgment if it
10 contains no more than conjecture or a scintilla of evidence insufficient to support a jury
11 verdict. *See Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) ("[M]ere
12 allegation and speculation do not create a factual dispute for purposes of summary
13 judgment."); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment
14 motion cannot be defeated by relying solely on conclusory allegations unsupported by
15 factual data."). "A non-movant's bald assertions or a mere scintilla of evidence are both
16 insufficient to withstand summary judgment." *FTC v. Stepanchik*, 559 F.3d 924, 929 (9th
17 Cir. 2009) (citing *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 658 (9th Cir.2007)).

18 A material issue of fact is one that affects the outcome of the litigation and requires
19 a trial to resolve the differing versions of the truth. *See S.E.C. v. Seaboard Corp.*, 677 F.2d
20 1289, 1293 (9th Cir. 1982); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir.
21 1982).

22 All facts and inferences drawn must be viewed in the light most favorable to the
23 responding party when determining whether a genuine issue of material fact exists for
24 summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962). After drawing
25 inferences favorable to the respondent, summary judgment will be granted if all reasonable
26 inferences defeat the respondent's claims. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1297, 1298
27 (9th Cir. 1982).

28 . . .

1 **IV. ARGUMENT**

2 **A. There is no Genuine Issue of Material Fact that Dr. Aranas was not**
 3 **Deliberately Indifferent to Melnik's Medical Needs**

4 To establish a constitutional violation, an inmate must satisfy a two-part test: (1)
 5 that he has a "serious medical need" and "failure to treat [his] condition could result in
 6 further significant injury or the 'unnecessary and wanton infliction of pain';" and (2) the
 7 defendants' response to the medical need was deliberately indifferent." *Jett v. Penner*, 439
 8 F.3d 1091, 1096 (9th Cir. 2006). To determine whether the defendants' response was
 9 deliberately indifferent, an inmate must show the following: (1) the defendants'
 10 purposefully acted or failed to respond to the inmate's possible medical need; and (2) the
 11 indifference caused harm. *Id.* Notably, the officials' conduct must demonstrate
 12 "unnecessary and wanton infliction of pain" before it violates the Eighth Amendment.
 13 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

14 Deliberate indifference is a high legal standard; a medical professional's mistake,
 15 negligence, or malpractice is not sufficient to constitute deliberate indifference. *Toguchi v.*
 16 *Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Every claim by an inmate that he has not
 17 received adequate medical treatment does not constitute an Eighth Amendment violation.
 18 *Estelle*, 429 U.S. at 105. An inmate alleging deliberate indifference to serious medical need
 19 "must allege acts or omissions sufficiently harmful" to the inmate. *Id.* at 106.

20 Dr. Aranas was not deliberately indifferent to Melnik's medical needs, because he
 21 did not purposefully fail to respond to Melnik's medical need. Although there was some
 22 delay between Melnik's initial request for treatment and when Melnik actually received
 23 treatment, there is no evidence suggesting that Dr. Aranas knew but purposefully failed to
 24 respond to the inmate's possible medical needs.

25 Concededly, there may have been some delay between when Melnik first became
 26 qualified for priority treatment and when he was approved for treatment. Melnik's APRI
 27 score exceeded 2.0 for the first time in March of 2016, making him eligible for prioritized
 28 treatment. Ex. 2 at 8. Melnik was not approved for treatment until May 9, 2017. *Id.* at 6.

1 However, nothing in the record suggests that Dr. Aranas knew of Melnik's prior requests
2 for treatment or intentionally caused any delay in approving Melnik for treatment. First,
3 Dr. Aranas does not respond to medical requests. *See* Dr. Aranas' responses to Plaintiff's
4 First Interrogatories, attached as **Exhibit 5**, at 4. Indeed, there is nothing in the record
5 that shows Dr. Aranas was aware of Melnik's APRI score prior to November 21, 2016, when
6 Dr. Aranas responded to Melnik's second level grievance regarding HCV treatment. *See*
7 Inmate Grievance #20063020432, attached as **Exhibit 6**, at 1. Dr. Aranas upheld Melnik's
8 grievance, stating that Melnik will be seen "very soon" regarding his request for HCV
9 treatment. *Id.* at 2.

10 It appears that any delay in approving Melnik for treatment was caused by other
11 reasons. One of those reasons is the evolution of HCV treatment during the relevant time
12 period. Indeed, Dr. Aranas stated that HCV treatment evolved during the relevant time
13 period, in that DAA became available for treatment, which may have been the cause of
14 delay in treatment. Ex. 5 at 6. Treatments for HCV in 2015 and before were interferon and
15 ribavirin with success rate of mere 33%. Ex. 5 at 8.

16 In addition, Melnik's fluctuating APRI score also was the reason for the delay in
17 approving Melnik for treatment. Between March of 2016 and the beginning of his
18 treatment in June of 2016, Melnik's APRI score hovered around the 2.0 threshold, rising
19 as high as 2.09 and dropping as low as 1.68. Ex. 1 at 9. Because the APRI score is used to
20 identify when disease progression to permanent liver damage is likely, improvements in
21 Melnik's APRI score suggested against disease progression and therefore need to provide
22 him Harvoni treatment.

23 Absent from the records is evidence showing that Dr. Aranas knew and intentionally
24 failed to respond to Melnik's requests for treatment, which is required to demonstrate that
25 Dr. Aranas was deliberately indifferent to Melnik's medical need. *Estelle v. Gamble*, 429
26 U.S. 97, 104 (1976). Admittedly, there was some delay between when Melnik first became
27 qualified and when the Committee approved him for Harvoni treatment. However, such
28 delay was caused by the evolution of HCV treatment during the relevant time period and

negligence on the part of HDSP medical staff at best. However, medical professionals' negligence does not constitute deliberate medical indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *see also Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (holding that deliberate medical indifference does not include "mere negligence in diagnosing or treating a medical condition"). There is no genuine issue of material fact that Melnik was eventually approved for HCV treatment and was cured. Ex. 2 at 15-16; Ex. 1 at 7. Without any evidence showing that Dr. Aranas intentionally failed to respond to Melnik's requests for HCV treatment, Melnik cannot establish an Eighth Amendment claim for deliberate medical indifference and Dr. Aranas is entitled to summary judgment.

B. There is no Genuine Issue of Material Fact that Melnik Cannot Establish he Suffered Further Injury due to Delay in Treatment

Even if this Court finds that Dr. Aranas purposefully failed to respond to Melnik's requests for Harvoni treatment, Melnik cannot establish that he suffered further injury due to delay in approving Harvoni treatment and cannot prove the extent of such injury, if any.

To determine whether the defendants' response was deliberately indifferent, an inmate must show the following: (1) the defendants' purposefully acted or failed to respond to the inmate's possible medical need; and (2) the indifference caused harm. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). As to the second prong of this *Penner* test, the Ninth Circuit has held that the "**mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference.**" *Colwell v. Bannister*, 763 F.3d 1060, 1081 (9th Cir. 2014); *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (emphasis added); *see also Colwell*, 763 F.3d at 1081; *Crozier v. Endel*, No. 3:09-CV-00694-LRH, 2012 WL 688464, at *8 (D. Nev. Jan. 23, 2012).

Federal Rules of Evidence ("FRE") 701(c) provides that a lay witness may not offer a testimony in the form of an opinion that is based on scientific, technical, or other specialized knowledge within the scope of FRE 702. Only a qualified expert witness with knowledge, skill, experience, training, or education may offer an opinion based on scientific, technical,

1 or other specialized knowledge. *See* FED. R. EVID. 702. Causation is a hypothetical question
 2 designated for expert witnesses. *See United States v. Urena*, 659 F.3d 903, 908 (9th Cir.
 3 2011); *see also Wilson v. Biomat USA, Inc.*, No. 2:10-CV-1657-GMN-RJJ, 2011 WL 4916550,
 4 at *1–2 (D. Nev. Oct. 17, 2011). “Because Plaintiffs bear the ultimate burden of proof on
 5 causation, [defendant] had only to point to the absence of a genuine issue of material fact;
 6 it wasn’t required to produce any evidence at all.” *Daubert v. Merrell Dow Pharm., Inc.*, 43
 7 F.3d 1311, 1315 (9th Cir. 1995) (citing *Maffei v. Northern Insurance of New York*, 12 F.3d
 8 892, 899 (9th Cir. 1993)).

9 In his Complaint, Melnik claims that he suffers from cirrhosis of the liver because
 10 Dr. Aranas denied his request for Harvoni treatment. ECF No. 4 at 7. However, there is no
 11 affirmative evidence that Melnik actually has cirrhosis of the liver. Indeed, Dr. David
 12 Hellerstein, defense expert witness, opined that whether the delay in approving Melnik’s
 13 request for treatment resulted in permanent damage to Melnik’s liver is doubtful. Ex. 1 at
 14 9. Specifically, Dr. Hellerstein stated that it typically takes 20 to 30 years, sometimes more,
 15 for cirrhosis to develop in the one third of HCV infected patients who ultimately do get
 16 cirrhosis. *Id.* Dr. Marshall Anthony, Melnik’s expert witness, agrees that cirrhosis develops
 17 over 25-30 year period, not over fifteen (15) months. *See* Dr. Marshall Anthony’s Expert
 18 Witness Report, attached as **Exhibit 7**, at 8. Dr. Hellerstein opined that, because fifteen
 19 (15) months between when Melnik’s APRI score exceeded 2.0 for the first time and when
 20 he was approved for treatment is only 4% to 6% of that time window, so it is doubtful that
 21 those fifteen (15) months resulted in permanent damage to Melnik’s liver. *Id.*

22 Melnik relies on ultrasound reports from December 15, 2016 and May 30, 2017 to
 23 argue that he has cirrhosis. ECF No. 4 at 7. Dr. Anthony similarly relies on the same
 24 ultrasound reports as well as an increase in Melnik’s APRI score to argue that Melnik has
 25 cirrhosis as a result of the alleged delay in approving treatment. *See* Ex. 7 at 10. Melnik’s
 26 ultrasound report in December of 2016 described a mildly enlarged spleen “**possibly** from
 27 mild elevation of the portal venous pressure secondary to cirrhosis.” Ex. 2 at 12. Ultrasound
 28 reports in May of 2017 and February of 2018 revealed coarsened liver texture/echogenicity.

1 However, “liver echogenicity [texture] . . . cannot be relied upon in diagnosing fibrosis, not
2 even cirrhosis . . .” Ex. 1 at 10. Dr. Hellerstein found that Melnik’s claim of having cirrhosis
3 is based upon flawed interpretation of two ultrasound reports. *Id.*

4 “Cirrhosis of the liver is diagnosed by biopsy or by non-invasive measures of liver
5 elasticity, unless cirrhosis has advanced to the point where esophageal varices, ascites, or
6 other signs of liver decompensation make the diagnosis obvious.” *Id.* Dr. Anthony does not
7 opine that Melnik has other advanced signs of cirrhosis such as varices or ascites. To simply
8 put, Melnik’s medical records do not conclusively support a diagnosis of cirrhosis. Ex. 2 at
9 11.

10 In fact, Dr. Hellerstein opined that there is actually evidence suggesting that Melnik
11 does not have cirrhosis of the liver. *See* Dr. David Hellerstein’s rebuttal expert report,
12 attached as **Exhibit 8**, at 1. Dr. Hellerstein opined that Melnik does not have cirrhosis
13 based on the evidence that HCV is no longer detectable in Melnik’s bloodstream, laboratory
14 evidence of a chronic inflammatory reaction in his liver is no longer present, and his APRI
15 score is less than 0.5. *Id.* According to UpToDate, the online website referenced in Dr.
16 Anthony’s report, interprets an APRI score of less than 0.5 to mean cirrhosis is unlikely.
17 *Id.* APRI score is useful, when it is low, for excluding advanced fibrosis or cirrhosis. *Id.* at
18 2. Specifically, more than 80% of HCV patients with an APRI score of 0.5 or lower do not
19 have significant fibrosis or cirrhosis. *Id.* Melnik’s last APRI scores taken six weeks and six
20 months after successful Harvoni treatment were 0.38 and 0.46 respectively. *Id.* Absent
21 other clinical evidence to the contrary, which Melnik has none, it is unlikely that Melnik
22 has significant fibrosis or cirrhosis. *Id.*

23 Even assuming, arguendo, that Melnik has advanced fibrosis or cirrhosis, Melnik’s
24 claim for damages would be speculative because Dr. Anthony could not and cannot opine
25 as to the extent of irreparable liver damage, if any, arising from the alleged delay in HCV
26 treatment. Ex. 7 at 10 (“I cannot comment on the extent of the irreparable liver damage”).
27 Melnik has not disclosed any other evidence or expert witness to prove the extent of his
28 damages. Absent proof of damages, summary judgment in favor of Dr. Aranas is

appropriate as Melnik's proof of damages is speculative. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988) (district court excluded expert witness report due to flaws in analysis and then granted summary judgment because there was no evidence left of damages); *D.A. Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1452 (9th Cir. 1983) (plaintiff neither identified expert witness nor designated documents supporting damages claim)); *see also City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992) (sole evidence of damages was expert study that failed to segregate losses, if any, caused by acts which were not antitrust violations from those that were)). Similar to *D.A. Rickards*, Melnik neither identified expert witness nor designated documents supporting his claim for damages. Therefore, this Court should find that Melnik's claim for damages is speculative and grant summary judgment in favor of Dr. Aranas.

C. Alternatively, Dr. Aranas is Entitled to Qualified Immunity

In addition to being entitled to summary judgment based on the lack of any genuine issue of material fact, Defendants are also entitled to summary judgment in this case under the doctrine of qualified immunity.

Whether governmental employees are entitled to qualified immunity is a question of law subject to *de novo* review before this Court. *Devereaux v. Perez*, 218 F.3d 1045, 1051 (9th Cir. 2000) (citing *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997)). Like summary judgment motions, "[t]his court must assume the relevant facts in the light most favorable to the Plaintiff, and then determine whether the defendants are nonetheless entitled to qualified immunity as a matter of law." *Devereaux*, 218 F.3d at 1051 (citing *Moran v. Washington*, 147 F.3d 839, 944 (9th Cir. 1998)).

The Plaintiff bears the burden of demonstrating that the underlying right was clearly established at the time of the alleged misconduct. If the Plaintiff meets this burden then the officials must prove that "their conduct was reasonable under the applicable standards even though it might have violated the Plaintiff's constitutional rights."

...

1 *Devereaux, supra* (citing *Romero v. Kitsay Cty.*, 931 F.2d 624, 627 (9th Cir. 1991) and
2 *Benigni v. City of Hemt*, 879 F.2d 473, 480 (9th Cir. 1998)).

3 It is a long-standing principle that governmental officials are shielded from civil
4 liability under the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818
5 (1992).

6 The defense of qualified immunity protects “government officials
7 . . . from liability for civil damages insofar as their conduct does
not violate clearly established statutory or constitutional rights

8 of which a reasonable person would have known.” The rule of
9 qualified immunity “provides ample support to all but the
plainly incompetent or those who knowingly violate the law.”
10 “Therefore, *regardless of whether the constitutional violation*
11 *occurred*, the officer should prevail if the right asserted by the
Plaintiff was not ‘clearly established’ or the officer could have
12 reasonably believed that his particular conduct was lawful.”
Furthermore, “[t]he entitlement is an immunity from suit rather
13 than a mere defense to liability; . . . it is effectively lost if a case
is erroneously permitted to go to trial.”

14 *Schroeder v. McDonald*, 55 F.3d 1115, 1121 (9th Cir. 2014) (quoting *Robinson v. York*, 566
15 F.3d 817, 821 (9th Cir. 2009).

16 When conducting the qualified immunity analysis, courts “ask (1) whether the
17 official violated a constitutional right and (2) whether the constitutional right was clearly
18 established.” *C.B. v. City of Sonora*, 760 F.3d 1005, 1022 (9th Cir. 2015) (citing *Pearson v.*
19 *Callahan*, 555 U.S. 223, 232, 236 (2009)).

20 The second inquiry, whether the constitutional right in question was clearly
21 established, is an objective inquiry that turns on whether a reasonable official in the
22 position of the defendant knew or should have known at the time of the events in question
23 that his or her conduct was constitutionally infirm. *Anderson v. Creighton*, 483 U.S. 635,
24 639-40 (1987); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012). Only where a
25 governmental official’s belief as to the constitutionality of his or her conduct is “plainly
26 incompetent” is qualified immunity unavailable. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per
27 curiam). Governmental officials are entitled to high deference when making this
28 determination, *Anderson*, 483 U.S. at 640, requiring the Court to assess whether qualified

immunity is appropriate “in light of the specific context of the case.” *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014) (quoting *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009)).

In determining “whether a [constitutional] right was clearly established,” this Court is to survey the law within this Circuit and under Supreme Court precedent “at the time of the alleged act.” *Perez v. United States*, 103 F. Supp. 3d 1180, 1208 (S.D. Cal. 2015) (quoting *Cnty. House, Inc. v. City of Boise*, 623 F.3d 945, 967 (2010); citing *Bryan v. MacPherson*, 630 F.3d 805, 933 (9th Cir. 2010). Only in situations where there is no precedent regarding the qualified immunity question at issue should this Court look to “other circuits and district courts to ascertain whether the law is clearly established.” *Cnty. House*, 623 F.3d at 967 (citing *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)).

On January 9, 2017, the Supreme Court unanimously reiterated what is meant by clearly established. There, in the case of *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam) (2017), the Court instructed as follows:

Today, it is again necessary to reiterate the longstanding principle that “clearly established law” should not be defined “at a high level of generality.” As this Court explained decades ago, the clearly established law must be “particularized” to the facts of the case. Otherwise, “[p]laintiffs would be able to

convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”

The panel majority misunderstood the “clearly established” analysis: It failed to identify a case where [the government officials] acting under similar circumstances . . . [were] held to have violated the [Constitution]. [*White*, 137 S.Ct. at 551-52].

The Ninth Circuit had the opportunity to further explain the dictates of *White* in its May 12, 2017 decision in *S.B. v. County of San Diego*, 864 F.3d. 1010 (9th Cir. 2017). There, the Ninth Circuit “acknowledge[d] the Supreme Court’s recent frustration with failures to heed its holdings,” and that the Court had “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” *Id.* at 1015. The *S.B.* court then acknowledged that it heard the Supreme Court “loud and clear,” and

1 noted that “[b]efore a court can impose liability on [a government employee, it] must
2 identify precedent as of the date” of the alleged constitutional deprivation, “that would put
3 [the government employee] on clear notice that” the individual’s action “in [this] particular
4 circumstance[] would” violate the constitution. *Id.*

5 The burden of proving whether the particular right in question was clearly
6 established rests with the non-governmental party. *Greene v. Camreta*, 588 F.3d 1011, 1031
7 (9th Cir. 2009), *vacated in part on other grounds*, 661 F.3d 1201 (9th Cir. 2011) (citing
8 *Galen v. Cty. of L.A.*, 477 F.3d 652, 655 (9th Cir. 2007)); *see also Kennedy v. City of*
9 *Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006).

10 With regard to the first prong, i.e., whether a constitutional right existed, for the
11 reasons noted above, Dr. Aranas maintains that he did not violate Melnik’s constitutional
12 right. There is no genuine issue of material fact that Melnik was eventually approved for
13 HCV treatment and was cured. Ex. 2 at 15-16; Ex. 1 at 7. In addition, there is no evidence
14 in the records suggesting that Dr. Aranas purposefully failed to respond to Melnik’s
15 requests for treatment, which is required to demonstrate that Dr. Aranas was deliberately
16 indifferent to Melnik’s medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

17 In addition, Dr. Aranas is entitled to qualified immunity because it was not clearly
18 established that Dr. Aranas was acting in violation of Melnik’s constitutional rights. Given
19 the particularized facts and circumstances of this case, it was not clearly established that
20 Dr. Aranas could be liable for the purported delay in approving treatment, especially when
21 Melnik was eventually approved for treatment and was cured of HCV infection. Dr. Aranas
22 acted in good faith and approved Melnik for treatment. Because there was no constitutional
23 violation and it was not clearly established that Dr. Aranas could be liable for the purported
24 delay, Dr. Aranas is entitled to qualified immunity.

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1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that this Court grant
3 summary judgment in favor of Defendants as to Plaintiff's Eighth Amendment claim for
4 deliberate indifference to serious medical needs. Viewing the facts and circumstances in
5 light most favorable to Melnik, there is no genuine issue of material fact that Dr. Aranas
6 was not deliberately indifferent to Melnik's medical needs. Further, there is no genuine
7 issue of material fact that Melnik did not suffer further injury and/or the extent of such
8 further injury. Additionally, Defendants are entitled to qualified immunity as no
9 constitutional violation occurred and Defendants acted in good faith and believed their
10 actions were constitutional.

11 DATED this 10th day of June, 2019.

12 AARON D. FORD
13 Attorney General

14 By: /s/ Henry H. Kim
15 Henry H. Kim (Bar No. 14390)
16 Deputy Attorney General
17 *Attorneys for Defendant Romeo Aranas*
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on June 10, 2019, I electronically filed the foregoing **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, by causing a true and correct copy thereof to be filed with the Clerk of the Court, using the electronic filing system to the following:

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